

**STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION**

UNITED STATES SURGICAL)
CORPORATION and)
MALLINCKRODT LLC)
)
CONCERNING A CHLOR-ALKALI)
MANUFACTURING FACILITY IN)
ORRINGTON, PENOBSCOT COUNTY,)
MAINE)
)
PROCEEDING UNDER 38 M.R.S.A.)
§ 1365, UNCONTROLLED HAZARDOUS)
SUBSTANCE SITES LAW)

**MALLINCKRODT'S MEMORANDUM REGARDING
BURDEN OF PROOF
AND RECORD UPON WHICH THE DECISION WILL BE BASED**

Pursuant to the Presiding Officer's Seventh Procedural Order (dated September 16, 2009), Mallinckrodt LLC and United States Surgical Corporation (hereinafter "Mallinckrodt") hereby submits its position on (1) the burden of proof in this matter, and (2) the record upon which the Board's decision must be based.

In short, pursuant to the plain reading of Section 1365 of the Uncontrolled Hazardous Substances Site Law, 38 M.R.S.A. § 1365, the Commissioner has the initial burden of going forward to prove the basis for and necessity of each and every component of its November 24, 2008 order (the "Order") and that proof must be based upon (i.e., is limited to) the information that was in existence at the time the order was issued (and not on some *post-hoc* rationalization -- that decision and its basis are frozen in time). After the Department's presentation of that information, the burden of going forward then shifts to Mallinckrodt (as the Appellant) to demonstrate, based upon a preponderance of all of the evidence provided to the Board, that the

Department did not have an adequate factual or legal basis for the Order, and/or that some or all of the requirements of Order are not necessary, such that the Order should be modified or rescinded.¹

Under a plain reading of the statute, the evidence that the Board can consider to determine whether the Department had an adequate factual and legal basis for issuing the Order² is that evidence before the Commissioner when he signed the Order. However, the ultimate “record” for purposes of the Board’s overall decision regarding the appropriate remedy (and related requirements) is all of the evidence (written and oral) and legal argument presented to the Board by all the parties during the course of the proceedings.

I. BACKGROUND

This proceeding is an appeal of the Maine DEP’s November 24, 2008 Uncontrolled Hazardous Substances Site Law (“Uncontrolled Sites Law”) administrative order, which Order dictated a remedy for the former HoltraChem Site. The Uncontrolled Sites Law’s statutory appeal procedures for this proceeding are as follows:

4. Compliance; appeal. The person to whom the order is directed shall comply immediately and may apply to the board for a hearing on the order if the application is made within 10 working days after receipt of the order by a responsible party. Within 15 working days after receipt of the application, the board shall hold a hearing, make findings of fact and vote on a decision that continues, revokes or modifies the order. That decision must be in writing and signed by the board chair using any means for signature authorized in the department's rules and published within 2 working days after the hearing and vote. **The nature of the hearing before the board is an appeal.** At the hearing, all witnesses must be sworn and **the commissioner shall first establish the basis for the order and for naming the person to whom the order is directed. The burden of going forward then shifts to the person appealing to demonstrate, based upon a preponderance of the evidence, that the order should be modified or**

¹ To be clear, Mallinckrodt is not suggesting, nor does the statute contemplate, a bifurcated approach to the hearing. Once the Department puts on its case concerning the basis for and necessity of the Order, Mallinckrodt will then proceed to demonstrate that the Order should be modified or rescinded.

² Mallinckrodt has previously stated its position on what factors must be considered in reviewing such basis in its prior filings in this matter. *See, e.g.*, “Mallinckrodt’s Position Regarding Criteria Applicable to the Board’s Review of Mallinckrodt’s Appeal” (August 6, 2009); Mallinckrodt’s “Appeal of Sixth Procedural Order” (September 1, 2009).

rescinded. The decision of the board may be appealed to the Superior Court in accordance with Title 5, chapter 375, subchapter 7.

38 M.R.S.A. § 1365(4) (emphasis added).

II. BURDEN OF PROOF

The term "burden of proof" is often used in an overly broad and vague fashion. There are actually two components to the concept of "burden of proof" in American jurisprudence. Those concepts are commonly referred to as the "burden of going forward" and the "burden of persuasion." At any given time, one party is obligated to produce evidence regarding a claim or defense. This is the burden of going forward.

The applicable section of the Uncontrolled Sites Law, Section 1365(4), while not stating so directly, can only be reasonably read in a manner in which the Commissioner initially has the "burden of going forward" to show the basis for his order. In particular, the language of that section states that once the Commissioner establishes the basis for his order, "the burden then shifts to the person appealing" the order. Unless the Commissioner initially had that burden, there would be no reason for the Legislature to include that burden shifting language in the statute. *See State v. Thongsavanh*, 2007 ME 20, ¶ 27, 915 A.2d 421, 427 (stating that the intent of the Legislature is gleaned from the plain language of the statute); *Me. Ass'n of Health Plans v. Superintendent of Ins.*, 2007 ME 69, ¶ 34, 923 A.2d 918, 928 ("We have stated on many occasions that the primary purpose in interpreting a statute is to give effect to the legislature's intent.").

In this case, the Commissioner has the burden of going forward to show the basis for his order -- which must be grounded in the eleven RCRA remedy selection criteria and which also must be "necessary" under the Uncontrolled Sites Law. The Commissioner will introduce the

evidence that he had before him at the time of issuance of the Order³ that served as the basis for the Order (including the remedy included in the Order) and from which the Commissioner determined that all aspects of the Order and the remedy required by the Order were necessary. Mallinckrodt must then present (i.e., go forward) to prove, based upon a preponderance of the evidence, that the Order should be modified or revoked.⁴

III. RECORD UPON WHICH THE DECISION WILL BE BASED

The decision of the Commissioner (as embodied in the Order) is limited to review of the information that was in the files at the Department as of the date of the issuance of the Order. The "basis" for the Order must have existed on the day the Order was issued. That is only common sense -- the Commissioner shouldn't be able to issue an order effective on a date certain and then attempt to justify (i.e., show the basis of) that order months later based upon information or evidence not in existence when the order was issued. Either there was a basis for the order -- and every aspect of such order was necessary at the time it was issued -- or there wasn't. *Post-hoc* rationalization of the terms of an order certainly cannot have been contemplated under a plain reading of the statute.

The ultimate decision by the Board regarding whether to modify or rescind the Order, however, should be based upon all of the information that is included in the record of these proceedings. Mallinckrodt, as the party seeking revocation or modification, is entitled to a *de novo* review of the Order (See Seventh Procedural Order at ¶ 3) and to present evidence to meet

³ See discussion in Section III, "Record Upon Which The Decision Will Be Based," below.

⁴ The second component of the concept of the burden of proof is that of the "burden of persuasion." Unlike the burden of going forward, the burden of persuasion never shifts. Allowing it to shift would make no sense, as it only applies in the context of the factfinder's final decision, in this case to the reasoning of the Board in reaching its final decision on the appeal. The Department (Appellee) has the burden to persuade the Board that, at the time of the signing of the order (and based upon the information then available), there was an adequate factual and legal basis for that order (and the remedy required by that order) and that such order and remedy are necessary. This is true despite the fact that the statute anticipates, and Mallinckrodt will undertake, introduction of additional evidence in its appeal.

its burden (preponderance of the evidence) that the Order should be modified or rescinded. Mallinckrodt had no chance to submit evidence prior to issuance of the order. There was no "hearing" or any other due process. Hence, Mallinckrodt cannot constitutionally be limited to record review and there is nothing in the statute that suggests that the record should be so limited.

IV. CONCLUSION

The Commissioner has the initial burden of going forward to prove the basis for and necessity of each and every component of his Order, and that proof must be based upon (i.e., limited to) the information that was in existence at the time the order was issued. Upon the Department's presentation of that information, the burden of going forward then shifts to Mallinckrodt (as the Appellant) to demonstrate, based upon a preponderance of all of the evidence provided to the Board, that the Department did not have a basis for the Order, and/or that some or all of the requirements of Order are not necessary, such that the Order should be modified or rescinded.

Under a plain reading of the statute, the evidence that the Board can consider to determine whether the Department had an adequate basis for issuing the Order is that evidence before the Commissioner when he signed the Order. However, the ultimate "record" for purposes of the Board's overall decision regarding whether to modify or rescind the Order

(including the remedy and all related requirements) is all of the evidence presented to the Board during the course of the proceedings.

Dated at Portland, Maine this 17th day of September, 2009.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. Van Slyke", written over a horizontal line.

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